19927 SERVICE DATE - NOVEMBER 27, 1996
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SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41512

EVAL COMPANY OF AMERICA, HALLMARK ELECTRONICS CORPORATION, VANDERVOORT'S DAIRY, A DIVISION OF THE KROGER CO., WITCO CORPORATION, AND WYNN'S CLIMATE SYSTEMS, INC.
--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF TRANSCON LINES

Decided: November 15, 1996

This proceeding arises out of the efforts of the trustee in bankruptcy of Transcon Lines (Transcon or respondent), a former motor carrier, to collect undercharges based on common carrier tariffs for certain transportation services performed during 1987-1990 by Transcon for the petitioners. We find that the collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Accordingly, we will not reach the other issues raised in the proceeding.

BACKGROUND

This matter is before the Board on referral from the United States Bankruptcy Court, Central District of California, in Leonard L. Gumport, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines v. Eval Company of American, Hallmark Electronics Corporation, Vandervoort's Dairy, a Division of the Kroger Co., Witco Corporation, and Wynn's Climate Systems, Inc., Case No. SB 93-22207 DN, Chapter 7, Adv. No. SB-94-01967 DN; Adv. No. SB-94-01018 DN and No. SB 94-02022 DN; Adv. No. SB-93-02415 DN; Adv. No. SB-94-01960 DN; and Adv. No. SB-94-01952 DN (referral orders dated September 28, 1994). The court stayed the proceedings to enable referral of several issues, including contract carriage, tariff applicability, tariff interpretation, unreasonable practice, and rate reasonableness to the ICC for determination. With respect to the unreasonable practice issue, the court requested a determination as to whether Transcon's "attempt to

[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to proceedings that were pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

recover the difference between the applicable tariff rate . . . and the negotiated rate" constituted an unreasonable practice.

Pursuant to the court order, petitioners, on December 27, 1994, filed a petition for declaratory order requesting the ICC to resolve the issues referred to by the court. By decision served January 11, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. On March 14, 1995, petitioners filed their opening statements. Respondent filed its reply on July 7, 1995. Petitioners submitted their rebuttal on July 27, 1995.[2]

Petitioners assert that Transcon's efforts to collect undercharges for shipments transported during 1987-1990 constitute an unreasonable practice under section 2(e) of the NRA.[3] Petitioners maintain that written evidence submitted by Hallmark and Vandervoort's shows that Transcon offered each petitioner a transportation rate which that petitioner relied upon in tendering shipments to Transcon; that such rates were billed and collected; and, that Transcon accepted payment by petitioners of these rates as payment in full.

Respondent's statement consists of legal argument of counsel. Respondent maintains that petitioners have not proffered written proof that the rates negotiated had been agreed upon, i.e., written evidence of the original rate charged, or that petitioners reasonably relied on this rate. Respondent also contends that section 2(e) of the NRA does not apply retroactively to pending claims such as those which are the subject of this proceeding.[4]

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[2] By decision served August 30, 1995, petitioners Eval Company of America and Witco Corporation, at their own request, were dismissed as parties to this proceeding. By decision served February 5, 1996, petitioner Wynn's Climate System, Inc., at its own request, was dismissed as a party to this proceeding. As a consequence, only Hallmark Electronics Corporation (Hallmark) and Vandervoort's Dairy, a division of The Kroger Co. (Vandervoort's), remain as petitioners in this proceeding.

[3] The shipments at issue moved under a discount rate filed by Transcon. After Transcon filed for bankruptcy, Transcon's original freight bills were subjected to an audit at the direction of the trustee. As a result of the audit, certain of the originally applied rates were re-rated and certain discounts were reduced or eliminated. The trustee re-billed each shipper in an attempt to collect the higher rate.

[4] With respect to the retroactive applicability of section 2(e), we point out that the courts have consistently held that section 2(e) by its own terms, and as more recently amended by the ICC Termination Act, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. See, e.g., Gold v. A.J. Hollander Co. (In re Maislin Indus.), 176 B.R. 436, 443-44 (Bankr. E.D. Mich. 1995); Jones Truck Lines, Inc. v. Scott Fetzer Co., 860 F. Supp. 1370, 1375-76 (E.D. Ark 1994); North Penn Transfer, Inc. v. Stationers Distributing Co, 174 B.R. 263 (N.D. Ill. 1994); Allen v. National Enquirer, 187 B.R. 29, 33 (Bankr. N.D. Ga. 1995); cf. Jones Truck Lines, Inc. v. Phoenix Products Co., 860 F. Supp. 1360 (W.D. Wisc. 1994).

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

At the outset, we note that the originally assessed and billed discount rates were contained in lawfully filed tariffs. Similarly, the higher undiscounted rate which the trustee now seeks to collect is also contained in a filed tariff. While section 2(e) could be read to bar collection of a higher filed rate only where the negotiated rate originally billed and collected was unfiled, we do not believe it can be so limited.

Section 2(e) was enacted essentially to resurrect the ICC's Negotiated Rates policy.[5] That policy was not intended to produce extended evidentiary inquiries or extended rate analyses to determine whether, in each instance, the negotiated rate, or the rate sought to be collected, was the applicable and/or reasonable rate. Rather, the focus of the Negotiated Rates policy was simply on whether the shipper and the carrier negotiated a rate on which the shipper relied, and whether the carrier now seeks to collect a rate that is higher than the agreed-to rate. Section 2(e), in our view, was not designed to complicate matters, but to resolve the undercharge crisis by holding a carrier to its bargain when it would be fair to do so. Requiring highly involved tariff analyses for every shipment before applying section 2(e) would not, in our view, advance the objectives of the NRA.

Nor does the statute itself limit section 2(e)'s availability to situations where the originally billed rate was unfiled. In evaluating whether a carrier's collection would be an "unreasonable practice" under section 2(e), the Board must consider, inter alia, whether the shipper was offered a rate by the carrier "other than that legally on file with the Board for the transportation service." Section 2(e)(2)(A) (emphasis added). If the carrier and shipper agreed to a price that was embodied in a filed rate that cannot be applied to the involved shipments, then the shipper was offered a rate not legally on file "for [that] transportation service." Thus, even if "some of [a carrier's undercharge claims] are based on it billing and collecting an erroneous [filed] rate, if the so-called erroneous rate was negotiated between the shipper and [carrier] and if the shipper reasonably relied on the rate, the rate would meet the definition of a `negotiated rate' and trigger the application of the provisions of the NRA." American Freight System, Inc. v. ICC (In re American Freight System), 179 B.R. 952, 957 (Bankr. D. Kan. 1995).

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer

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[5] See NITL--Pet. to Inst. Rule on Negotiated Motor Car. Rates, 3 I.C.C.2d 99 (1986) and 5 I.C.C.2d 623 (1989) (Negotiated Rates).

transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[6]

It is undisputed that Transcon no longer transports property.[7] Accordingly, we may proceed to determine whether the respondent's attempt to collect undercharges is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

In E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994) (E.A. Miller), the ICC held that the original freight bills embodying the negotiated rate meet the "written evidence" standard of section 2(e). In Johnson Welding & Manufacturing Co. et al. v. Bankr. Estate of Murphy Motor Freight Lines, Inc., No. 40716 (ICC served May 9, 1995), the ICC explained that evidence of the existence of freight bills embodying the negotiated rate, sample freight bills, or some other contemporaneous writing evidencing the existence of a negotiated rate, satisfies the section 2(e) standard.

Frank Van Leer, Director of Operations and Vice President for Hallmark, a distributor of electronic and computer components, states that it was his responsibility to oversee the transportation arrangements with Transcon for the movement of Hallmarks' traffic between 1987 and 1990. Mr. Van Leer testifies that Transcon offered to transport Hallmark's products at what was represented to be a discount rate. The agreed-upon discounted amount was noted on each of the Transcon freight bills. According to Mr. Van Leer, full and prompt payment for the freight bills was made by Hallmark and accepted by Transcon without objection.[8] Attached to Mr. Van Leer's statement, described by Mr. Van Leer as correspondence, is a copy of Tariff ICC TCON 625, revised page 4380, issued by Transcon for discount application on behalf of Hallmark.[9]

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[6] Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

[7] Transcon held both motor common and contract carrier operating authority, issued by the ICC under various sub-numbers of No. MC-110325. All of Transcon's operating authorities were revoked on September 21, 1990.

[8] Petitioners' March 14, 1995, Opening Statement, Declaration of Frank Van Leer, Exhibit A2.

[9] This tariff revision was issued 12/18/87, effective

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Vandervoort's, a division of the Kroger Co., shipped its products to various customers within the United States via Transcon during 1987-1990. Mr. Ron Beagle, Kroger's corporate transportation manager whose duties include supervising transportation arrangements for Vandervoort's, states that Transcon offered to transport Vandervoort's products at what was represented to be a discount rate. The agreed-upon discounted amount was noted on each of the Transcon freight bills. According to Mr. Beagle, full and prompt payment for the freight bills was made by Kroger and accepted by Transcon without objection.[10]

Attached as Exhibit C to petitioners' opening statement are representative revised freight bills consisting of 11 sample bills submitted on behalf of Hallmark (Exhibit C2)[11] and 1 sample bill submitted on behalf of Vandervoort's (Exhibit C3).[12] These revised freight bills show the original amount billed by Transcon and paid by the respective petitioner, the interest and undercharge claimed, and the asserted balance due.

Also included in Exhibit C are a list of shipments at issue in which the originally granted discount has been disallowed for failure to pay the billed charge within 90 days. Those of respondent's undercharge claims which rely solely or in part on this late pay penalty are listed in Exhibit C6 (Hallmark) and Exhibit C7 (Vandervoort's).[13] Respondent concedes that, in light of the Supreme Court's decision in ICC v. Transcon Lines, 115 S. Ct. 689 (1995), those of its undercharge claims predicated on the late payment provision of its tariff are invalid. To the extent that any of its revised freight bills are based solely on such late payment claims, respondent agrees that they should be stricken from this proceeding. Of the undercharge claims identified in the 11 representative revised freight bills

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1/4/88, and reads:

> "On shipments rated at class 100 or lower first apply 100% of the current class 70 rates and then apply a 35% discount.
>
> Current TCON 500 rates apply.
>
> Applies only from and/or to facilities of HALLMARK ELECTRONICS."

[10] Petitioners' March 14, 1995, Opening Statement, Declaration of Ron Beagle, Exhibit A3.

[11] One of the freight bills submitted on behalf of Hallmark (Freight Bill Number 074-136595, dated 8/31/87) indicates that only a partial payment has been made on the originally assessed bill. The balance due total merely consists of the unpaid portion of the original bill plus interest and does not reflect an undercharge claim subject to this proceeding.

[12] Vandervoort's submitted revised freight bill Number 036-522425, in which the originally applied 30% discount was disallowed.

[13] Undercharge claims totaling $6,147.33 assessed against 39 Hallmark shipments and 1 undercharge claim of $896.31 assessed against Vandervoort's are affected by the late-pay penalty.

submitted on behalf of Hallmark, only 1 totally relies on the 90-day-late pay penalty. Vandervoort's representative freight bill does not reflect a 90-day late pay penalty.

Both Mr. Van Leer and Mr. Beagle assert that their respective companies, in tendering their traffic to Transcon rather than to its competitors, relied upon Transcon's representations that the rates quoted and billed to them were the lawful applicable rates.

We conclude that the representative freight bills and the revised tariff page confirm the testimony of Mr. Van Leer and Mr. Beagle with regard the existence of negotiated discount rates and satisfy the written evidence requirement of section 2(e).

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence establishes that a negotiated rate was offered by Transcon to Hallmark and Vandervoort's; that each shipper tendered freight to Transcon in reliance on the negotiated rate; that the rate negotiated was billed and collected by Transcon; and that Transcon now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Transcon to attempt to collect undercharges from Hallmark or Vandervoort's for transporting the shipments at issue in this proceeding.[14]

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[14] Although the record here does not contain all of the freight bills for which respondent seeks undercharges, it does contain sample freight bills which appear to be representative of all of Transcon's undercharge claims. These freight bills constitute written evidence of a negotiated rate as to each of those shipments. The record also contains the uncontroverted testimony of Mr. Van Leer and Mr. Beagle as to their reliance on the originally negotiated rate. Transcon's general assertion that petitioners have not provided written evidence of the rate originally charged or of the shippers' reliance on that rate clearly fails as to those shipments identified in the freight bills.

As to any other shipments as to which specific freight bills were not submitted, where the documentation is similar to that presented in the sample freight bills, it would be an unreasonable practice for Transcon "to attempt to recover the difference between the applicable tariff rate . . . and the negotiated rate." We do not believe the court intended that we review the documentation for each shipment for which Transcon seeks reimbursement and give our opinion as to the

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Our finding in this decision applies only to the Transcon claims for undercharges and not to claims based on unpaid or partially paid original freight bills.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on November 27, 1996.

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unreasonableness of each attempted collection. Instead, we believe that we have answered the court's inquiry by declaring it to be our legal opinion that, to the extent other undercharge demands follow the pattern outlined here, they too would constitute an unreasonable practice.

3. A copy of this decision will be mailed to:

The Honorable David N. Naugle
United States Bankruptcy Court,
Central District of California
200 Federal Building
699 North Arrowhead Avenue
San Bernardino, CA 92401

Re: Case No. SB 93-22207 DN, Chapter 7
Adv. No. SB 94-01952 DN
Adv. No. SB 94-01018 and 94-02022 DN
Adv. No. SB 93-02415 DN

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary